

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHYMAN SCOTT GILES,

Defendant-Appellant.

UNPUBLISHED

July 30, 1999

No. 206779

Ingham Circuit Court

LC No. 97-071793 FC

Before: Markey, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by jury of armed robbery, MCL 750.529; MSA 28.797, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and carrying a concealed weapon (CCW), MCL 750.227; MSA 28.424. We affirm.

Defendant first argues that his due process rights were violated when the jury selection portion of his trial was not transcribed. See *People v Ramsdell*, 230 Mich App 386, 402; 585 NW2d 2 (1998); *People v Bass (On Rehearing)*, 223 Mich App 241, 260; 565 NW2d 897 (1997), vacated in part on other grounds, 457 Mich 865 (1998). According to the record, the voir dire transcript was filed with the trial court on May 26, 1998, after defendant's motion for new trial was denied. Defendant does not claim any other error on appeal other than that he was entitled to the transcript. Because defendant apparently received a copy of the voir dire transcript prior to filing his brief on appeal, we conclude that defendant has already received the relief he is seeking on appeal, and that this issue is now moot.

Defendant next argues the trial court abused its discretion by admitting evidence of either defendant's or codefendant's "flight" at trial. Defendant failed to preserve this issue by making a timely and specific objection regarding the evidence below. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). We will review an unpreserved issue only if the failure to do so would result in manifest injustice to the defendant. *Grant, supra* at 547. In this case, review is unnecessary because "[i]t is well established in Michigan law that evidence of flight is admissible." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Defendant next argues the prosecutor improperly vouched during closing argument for the credibility of two police officers, who were witnesses. Since defendant did not object to the alleged improper remarks below, appellate review is precluded unless an instruction could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We conclude that the prosecutor did not improperly vouch for the credibility of the witnesses to the effect that he had some special knowledge concerning their truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Rather, the prosecutor's statement was a proper response to arguments defendant raised during his closing, *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992), and a proper comment on the evidence as it related to the prosecutor's theory of the case. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Since any error could have been cured by an instruction, and no miscarriage of justice would result to defendant from this Court's failure to review this issue, we decline review. *Stanaway*, *supra* at 687.

Defendant next argues that his double jeopardy rights were violated when he was convicted of armed robbery and carrying a concealed weapon. We review double jeopardy issues de novo. *People v Peerenboom*, 224 Mich App 195, 199; 568 NW2d 153 (1997). The United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15; *People v Torres*, 452 Mich 43, 63; 549 NW2d 540 (1996). These guarantees are substantially identical and protect a defendant against both successive prosecutions for the same offense and multiple punishments for the same offense. *Torres*, *supra* at 64. Although it is not clear, defendant appears to be raising the issue of multiple punishments regarding his armed robbery and carrying a concealed weapon convictions, and his armed robbery and felony-firearm convictions.¹ There are two different tests to be applied under the federal and Michigan Constitutions.

Regarding multiple punishments, violation of the federal double jeopardy protection depends on the elements of the offenses charged. Under the federal test, set forth in *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932), two separate offenses generally exist when each offense requires proof of at least one fact that the other offense does not. *People v Denio*, 454 Mich 691, 707; 564 NW2d 13 (1997). Under the Michigan Constitution, the analysis involves whether there is a clear indication of legislative intent to impose multiple punishment for the same offense. *People v Mitchell*, 456 Mich 693, 695-696; 575 NW2d 283 (1998); *Denio*, *supra* at 708. In *Peerenboom*, *supra* at 200, this Court stated:

When determining legislative intent in this context, we look to whether each statute prohibits conduct violative of a distinct social norm, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, and the elements of each offense.

Defendant was convicted of armed robbery, the elements of which are (1) assault, (2) felonious taking of property from the victim's person or presence, and (3) defendant was armed with a weapon described in the statute. *People v Johnson*, 215 Mich App 658; 547 NW2d 65 (1996). Defendant was also convicted of carrying a concealed weapon.² Carrying a concealed weapon is a general intent crime. *People v Combs*, 160 Mich App 666, 673; 408 NW2d 420 (1987). The only intent necessary

is an intent to do the act prohibited, to knowingly carry the weapon concealed on one's person. *People v Iacopelli*, 30 Mich App 105, 107; 186 NW2d 38 (1971); *Combs, supra* at 673.

In *People v Emery*, 150 Mich App 657, 663; 389 NW2d 472 (1986), this Court explained that the purpose of the CCW statute “is to protect quarreling persons from being injured by an adversary who might suddenly draw and use a concealed weapon without notice.” In *Emery, supra* at 664, this Court also stated:

We acknowledge that, although both the armed robbery statute and the concealed weapon statute are designed to protect persons, there is a significant distinction between the two statutes in that with the concealed weapons statute there need not be any overt act toward the person of another in order for the offense to be consummated.

Addressing the federal test first, this Court concludes that the elements of armed robbery and CCW are sufficiently different so that a conviction of both based on the same events did not violate defendant's rights. Armed robbery requires an assault with intent to deprive a person of property while armed with a weapon. CCW merely requires that a person knowingly possesses a gun; it need not be used or carried with any particular intent. *Iacopelli, supra* at 107; *Combs, supra* at 673. Given the different proofs the two crimes require, these are separate offenses, and defendant's rights under the federal constitution were not violated.

Regarding the Michigan standard, we conclude for many of the same reasons that the armed robbery and CCW statutes are sufficiently different to infer that the Legislature intended separate punishments for both. First, each statute protects against a separate social harm. Armed robbery protects against theft of property effectuated by a weapon, and CCW protects against an unexpected confrontation with a concealed weapon. Second, the statutes provide greatly different terms of punishment, five years for CCW, and any term of years to life for armed robbery. Finally, the elements of the two crimes are very different. Armed robbery requires the actual assault and taking of property from a person or the presence of the person, while utilizing a weapon in some fashion. CCW merely requires the presence of an unlicensed weapon concealed on the person, it does not require any other act other than possession. Given the different purposes, elements, and punishment behind these two statutes, this Court concludes that the Legislature intended separate punishments and that defendant's convictions do not violate the double jeopardy protections against multiple punishments. *Peerenboom, supra* at 200-201.

We also reject defendant's argument that his convictions for both armed robbery and felony-firearm violate his double jeopardy rights. The felony-firearm statute, MCL 750.227b; MSA 28.424(2), specifically provides for multiple punishments except for four enumerated felonies. Because armed robbery is not one of the four felonies excepted from punishment in the felony-firearm statute, defendant's conviction of armed robbery and felony-firearm was proper. *Mitchell, supra* at 698.

Finally, defendant argues that trial counsel was ineffective for failing to move for a mistrial or otherwise correct or preserve the four errors alleged on appeal. We disagree. Effective assistance of

counsel is presumed, and the defendant bears the burden of proving otherwise. *Stanaway, supra* at 687-688; *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). Because we conclude that no error occurred in this case, any motion for mistrial based on these alleged errors would have been frivolous. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998); *People v Lyles*, 148 Mich App 583, 596, 385 NW2d 676 (1986).

Affirmed.

/s/ Jane E. Markey

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald

¹ Defendant's brief on appeal cites case law detailing the "same transaction" test, which is the test utilized by the courts for questions regarding the bar against successive prosecutions. See *People v White*, 212 Mich App 298, 305-306; 536 NW2d 876 (1995). Here, defendant was convicted of armed robbery, felony-firearm, and carrying a concealed weapon at a single trial; there were no successive prosecutions.

² The CCW provision at issue here, MCL 750.227(2); MSA 28.424(2), reads as follows: "A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person . . . without a license to carry the pistol as provided by law"